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GERMANIC AND MOORISH ELEMENTS OF THE SPANISH CIVIL LAW

SPANISH law, like Spanish civilization, owes its form to Philip II. His *Nueva Recopilacion* was on the legal side like the Escorial on the architectural, the Inquisition on the religious, and the Armada and work of Alva on the political side — the supreme expression of the will which ruled Spain with a rod of iron. The *Siete Partidas* is mentioned oftener, the work of Alfonso the Wise of Castile, before there was a united Spain. Nevertheless the tendency represented by the *Siete Partidas* — the law in Seven Parts — culminated in Philip's *Recopilacion*, the first real Spanish codification of jurisprudence, because only then was there a real Spain. The *Partidas*, moreover, was never more than supplementary,[1] while Philip's code was the law until Charles IV found it needful to revise it, unchanged in principle, by his *Novisima Recopilacion*. This in turn did duty until the days of the Constitution of 1812 and the modern Commercial, Civil, Criminal, Civil Procedure, Criminal Procedure, Political, and Mortgage codes, — which might be said to make up a *Novisimas Siete Partidas* or Law in Seven Parts.[2]

The origins of Spanish law, therefore, go back of Philip II, and back even of Alfonso El Sabio. As with Tamar, two principles struggled for precedence, and, although the Roman can be marked with a scarlet thread because it first showed itself, the Germanic or

[1] E. Stocquart, 4 REV. DE DROIT INT. (2e Série), 554 (1902).

[2] A study of the early codes is in the lecture of Wm. Wirt Howe, republished in 60 ALBANY L. J. 101. His Yale studies in the Civil Law cover the civil law, mainly French, as found in Louisiana.

Gothic element breaks forth like Pharez, and indeed we shall also find Moslem and particularistic influences prominent in the thousand years' gestation from the Roman Empire to the expulsion of the Moors.[3]

Roman Law in Spain is a subject by itself. Spain and France were thoroughly Romanized and the *jus civile* was as well known and obeyed at Gades (Cadiz) and Tarragona as at Rome and Naples, and the Roman cities of the two peninsulas were much alike. But it was that law as it was known before Justinian. His Digest and Code were yet to be, for Spain was severed from the empire while the law, as developed by the prætor and changed only by the early emperors, was in force. Justinian never ruled more than a part of the Mediterranean coast of Spain, nor did his legislation. Nevertheless in Hispania the prætor had already given way to the *judex*, and the *conventus* or circuits of the numerous courts, varying from time to time, brought justice home to all.

In every important city was the forum, and on it was a basilica, the seat of the courts. In the late empire law was less influential, and the forum became the plaza, the basilica became the church; but even there prevailed a Roman ritual and a Canon Law taken from the civil, and still later the Latin language and the Civil Law attracted and charmed rude barbarians from the north, whether named Alans, Suevi, Vandals, or Goths. Roman principles and forms survived Roman political rule.

The reverence for documents and documentary evidence, for the notary who makes the protocol, the love of form which equalizes the two species of property known in other lands as realty and personalty, and almost ignores heirs and fraud until a court has de-

[3] The approximate dates and number of articles of the principal codes are as follows: A. D. 466–485, Code of Euric; 506, Breviarium Aniani; 687–700, Fuero Juzgo, 578 laws; 1212, Fuero Viejo, 229 laws; 1255, Fuero Real, 545 laws; 1258, Especulo, 675 laws; 1263, Siete Partidas, 2479 laws; 1300, Leyes de Estilo, 252 laws; 1348, Ordenamiento de Alcala, 125 laws; 1490, Ordenamiento Real, 1133 laws; 1502, Laws of Toro, 83 laws; 1567, Nueva Recopilacion, 3391 laws; 1680, Recopilacion de Indias, 6474 laws; 1745, Autos Acordados, 1134 laws; 1805, Novisima Recopilacion, 4020 laws; 1829, Codigo de Comercio, 1219 articles; 1855, Ley de Enjuiciamento Civil, 1415 articles; 1870, Criminal Code (extended to Porto Rico in 1879), 626 articles; 1881, Civil Procedure (P. R. 1885), 2182 articles; 1882, Criminal Procedure (P. R. 1889), 998 articles; 1885, Commercial Code (P. R. 1886), 955 articles; 1889, Civil Code (P. R. 1889), 1976 articles; 1893, Mortgage Law (P. R. 1893), 413 articles. Those prior to 1847 are found in the excellent quarto edition beginning with that date published at Madrid, each with valuable introductions and notes.

clared them such, go back to a Roman source; but what has been called a spiritual or Germanic principle also appears in the Civil Code,[4] for a contract binds the parties if its essence — agreement — exists even though the form prescribed by law be lacking. In the province of torts the Roman principle that a man is responsible only for what he does himself [5] still prevails and *respondeat superior* is unknown beyond a few instances fixed by modern legislation.[6]

The first great modification of Roman Law came from the Germanic conquerors of the country and particularly the Visigoths or West Goths; for Hallam is right in saying that they were to Spanish history what the Anglo-Saxons were to English.

Visigoths overran the empire from east to west, and about 412 established their capital at Tolosa (Toulouse). The conquerors, fewer in number than the provincials, left the conquered under the old complex rules of civil relations, while they took two thirds of the land for themselves and retained the freer social organization and customs described in Tacitus' "Germania." King Euric about 475 compiled the German customs for his Visigothic comrades, and his successor, Alaric II, hardly a quarter of a century later drew up a Digest or *Breviarium* for his Roman subjects, largely made up of the Institutes of Gaius and the edicts of Theodosius. These were valid for the respective races from the Atlantic to the Garonne, for Spain as we know it had not yet a local name or national feeling.

The formulas of court procedure in ancient Rome had been the means by which the prætors worked their legal revolution, and the closing of the Common Law forms was to be the occasion for the development of the equity jurisdiction of the English chancellor. Indeed in all ages procedure was to be the means by which substantive law came to be. So that it is perhaps not surprising that the eighty-six formulas of procedure and instruments found in the *Codex Ovetensis* of Madrid [7] give us the links between the different systems for the Romans and the Goths and a uniform code for all people in the country. Among them those for testaments, sales,

[4] 8 MANRESA, COMENTARIOS, 2 ed., 690, on articles 1278–79.

[5] SOHM, INST. ROMAN LAW, 233, § 45.

[6] CIVIL CODE, Art. 1902–03 (PORTO RICO CIVIL CODE, Sec. 1803–04). Thus the owner of a private automobile in Porto Rico is not generally liable for acts of the chauffeur unless he is personally in control. Vélez *v.* Llavina, 18 P. R. 634 (1912); Avila *v.* Fantauzzi, 7 P. R. Fed. Rep. 4 (1913).

[7] Published at Paris, 1854.

gifts, and court procedure are based on Roman Law and are for Romans, and the *Lex Aquilia* and *Lex Papia Poppaea* are freely cited as authorities. On the other hand the dowry or purchase money given by the husband is Gothic and supersedes the civil law gift by the father to the bride. The Roman rule forbidding a freeman to sell himself is abolished, and the Gothic rule prevails against alienation of property in litigation.[8]

The coexistence of the two systems was inevitable at first, but the admirable Roman roads, particularly in the west and in the province along the Baetis, now the Guadalquivir, facilitated communication. Old customs and the new trading population, descended from the fifty thousand Jews whom Trajan had transplanted to the peninsula, gradually broke down the barriers between the races.

In course of time, therefore, the Goths and the Romans became assimilated somewhat as the Normans and Saxons were to be much later in England, and the Gothic kings came to legislate as for one people. Leovigild and Recaredo were perhaps the first to reform Euric's laws on Roman models, and Chindasvintus became the Visigothic Justinian.[9] He was the originator of much of the work which his son Recesvintus presented to the eighth council of Toledo for adoption as the *Liber Judicum* or *Fuero Juzgo*. While the *Fuero* as we have it is a more or less consistent book, there is no difficulty by a kind of higher criticism in detecting the elements and their growth at the several councils from the time of Leovigild, who first occupied Toledo and established civilization on a firm basis. Recaredo, his successor, assumed the imperial title Flavius and began the legislation of the Goths,[10] which culminated in the law of Chindasvintus forbidding the use of the Roman or any other law book than the *Fuero Juzgo*.[11]

Originally the Visigoths were Arians, and like other Arians tolerant, but, when Recaredo and his officials with him embraced Catholicism in 589 at the third council of Toledo, the new faith proved itself thoroughgoing. The country still remained all but independent of

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[8] 1 F. CARDENAS, ESTUDIOS JURIDICOS, XXXIX *et seq.*

[9] An edition of his LIBER JUDICUM in English was published by S. P. Scott at Boston in 1910.

[10] 1 F. CARDENAS, ESTUDIOS JURIDICOS, 70 *et seq.*

[11] Law VIII, tit. I, Liber II.

Rome, but in their zeal for conversion of the kingdom the priests invaded homes and assumed every function in the state. The king became practically their servant and in their councils all legislation was passed. Spain owed her unity to the church, and has repaid the debt by her devotion.

Ervigius and Egica added some laws, especially against the Jews, as did Wamba; but the Book of Judges, *Fuero Juzgo*, was substantially as Recesvintus and his father Chindasvintus left it.[12]

No doubt much, perhaps most, of this legislation was due to the bishops in these councils, for they were the learned class and exercised great influence. This is indicated in many ways. The laws are often based on the Mosaic dispensation, as in the frequent instances of *lex talionis*, and, while the clergy is often subjected to the law, the punishment is much lighter than for laymen, and the bishop is given a kind of supervision or visitation of courts and judges.

While these councils of Toledo were not representative in the modern sense, they were national and marked the rise of peninsular interests. As the Gothic lands across the Pyrenees fell away, the councils built up a Spanish patriotism.

The preambles to the laws express high aims and often show great wisdom. That law is the mistress of life,[13] that it is designed to repress evil, that it must be amended from time to time to meet new evils, are among its maxims and might well be taken from a modern law book. Indeed the preliminary title of the *Fuero*, decreed in the eighth council of Toledo, declares to the king that he will be king only so long as he does right. The equality of men before the law is expressly declared.[14] Christianity was inculcated and Jews punished severely.[15]

God is declared to be justice,[16] an expression which would seem to be worthy of St. Augustine. The happiness of the state therefore is the practice of the precepts of law.[17] The family is upheld, even to the extent of requiring the wife to be the younger,[18] and

[12] 1 F. CARDENAS, ESTUDIOS JURIDICOS, 134, XIV.
[13] Law II, tit. II, Liber I.
[14] Law II, tit. I, Liber II.
[15] Laws II and IV, tit. II, Liber XII.
[16] Law II, tit. II, Liber I.
[17] Law IX, tit. I, Liber I.
[18] Law V, tit. I, Liber III.

unlike the Roman Law the father could not sell his son.[19] Responsibility attaches only to the actual criminal,[20] and the attainder of the English Common Law was unknown. The punishments declared are severe, even barbarous, being generally scourging and extending to cutting off a hand, putting out an eye, and also to execution; but on the other hand the judge is instructed to be moderate in his punishments. A favorite remedy is making the offender the slave of the man he has wronged. Trade was encouraged with foreigners, who must be well treated by the judges.[21]

The Roman Law nevertheless greatly influenced the *Fuero Juzgo*. There, as in all other Spanish codes, the Law of Obligations, embracing contracts and torts, is largely adopted from the Civil Law. Sale, lease, and contracts in all their forms appear and go back of the times of the fighting, nomadic Goth.

Family relations, however, remained Germanic. Thus there could be no marriage without dowry by the husband,[22] and there could be no gift between husband and wife until after a year.[23] These principles were contained in the local *fueros*, and we find them in the life of the Cid and others, the difference being that later there was no limit to the amount of the dowry. But it was not until the *Partidas* that, adopting the Roman customs, the husband acquired power over the dowry.[24]

The chronicle of the Cid shows curious facility of remarriage. When unworthy sons-in-law abused and deserted his daughters, the Campeador's friends overcame the men in the lists before the king and *Cortes*, and the two deserted wives were without court divorce given in marriage to royal princes of other houses.[25]

A striking feature of Spanish law is the conjugal partnership, the joint ownership or community by husband and wife of property acquired during marriage. This is not Roman, and comes into view first in a law of Recesvintus to be found in the *Fuero Juzgo*,[26]

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[19] Law VII, tit. III, Liber VI; Law XII, tit. IV, Liber V.

[20] Law VII, tit. I, Liber VI.

[21] Law VII, tit. I, Liber I.

[22] Law I, tit. I, Liber III.

[23] Law VI, tit. I, Liber III.

[24] Part. IV, tit. II, Law XVIII, etc.

[25] FUERO JUZGO requires divorce, Law I, tit. VI, Liber III.

[26] Law XVI, tit. II, Liber IV. Its history is traced by 9 MANRESA, COMENTARIOS, 2 ed., 542 *et seq.*, commenting on CIVIL CODE, Art. 1392, etc.

which preserved the individual ownerships in property acquired before marriage. The custom was recognized by many local *fueros* when they came into existence.[27] The *Partidas* does not mention it, but hardly intended to abolish it,[28] and it has been the practice at least ever since the laws of Toro and of Ferdinand and Isabella.

In all early law personal relations or status occupy the first place, and they have retained it in Spain. Slavery in ancient times was personal, but was being ameliorated in the *Fuero Juzgo*, for masters were held accountable for cruelty.[29] Later in the Middle Ages slavery became serfdom, the people annexed to the soil;[30] but the feudal system came slowly in Spain and fiefs were rare in Castile until the fourteenth and fifteenth centuries,[31] when they were in the rest of Europe beginning to give way to modern tenures. Chivalry *en gross*, so to speak, however, extends almost from Bernado del Carpio at Roncesvalles until — Don Quixote de la Mancha! Commendation or submission of freemen to a lord became not uncommon, but such *benefactoria* are not known in the *Fuero Juzgo*. There we find slaves and freedmen with duties to their patrons similar to those of the Roman *libertini*, and land seems to be held in absolute ownership, with measures both Roman and Gothic.

When we pass from status to contract the *Fuero Juzgo* finds the Roman Law ready to hand and adopts not only its principles but often its terms and language. This has also been the case with the later codifications, and the *Partidas*, for instance, is arranged on the model of the Digest of Justinian. By the time of Philip V, grandson of Louis XIV, Spanish law was regarded as incidental to the Roman Law.[32] While the beauty and value of the old Roman Law has always caused it to be influential, it was never received in the sense that it was in France and Germany, and strictly speaking it is not the Common Law of Spain.[33] The Barcelona *Cortes* in 1251 petitioned King Jayme I to forbid the use of Roman Law in the courts.[34] The term Common Law is not unknown, but it is

[27] 2 F. CARDENAS, ESTUDIOS JURIDICOS, 77, 92.
[28] *Ibid.*, 100, 104.
[29] Law XII, tit. V, Liber VI.
[30] E. Stocquart, 10 REV. DE L'UNIV. BRUX., 473.
[31] *Ibid.*, 468.
[32] E. Stocquart, 4 REV. DE DROIT INT. (2e Série), 556 (1902).
[33] ASSO, INSTITUTES OF CIVIL LAW OF SPAIN, XX, etc.
[34] E. Stocquart, 4 REV. DE DROIT INT. (2e Série), 555 (1902).

used more in a theoretical than a practical sense, as being those principles common to the whole country or to the world, much as the *jus naturae* of the Stoics.[35] Some of this was in the Roman Law, but some of it was in the local customs not written but of long use, as they are described in the *Partidas*.[36] These kept alive much of the Germanic law of old, just as the *Coûtumes*, particularly of Paris, were doing across the Pyrenees.

Mohammedan Influences

The main sources of Spanish law therefore up to this time were the Roman Law and Germanic custom, combined at least for the land in the *Fuero Juzgo* or *Liber Judicum*.

But a third source of legal institutions, almost unnoticed heretofore,[37] must be found in the Arabs, whose invasion in 711 and rapid conquest constitute a romantic and far-reaching element of Spanish history. At first they threatened to cross the continent and joining hands with brethren from Damascus ingulf Europe in Mohammedanism. This was only prevented by Charles Martel's victory, the crowning mercy of Tours, in 732. The Arabs were thrown back southward to develop a Moslem empire in the Spanish peninsula over against the Christian survivors, looking on powerlessly from the mountains and coasts of the north. There came to be a Moslem Spain, centering at Cordova, as previously there had been a Gothic Spain centering at Toledo.

By 756 the Arabs or Moors had made of Spain the khalifate of Cordova, to be not only independent of Damascus and Babylon, but the focus of one of the great civilizations of the world. From a country mainly of hunters and shepherds, as shown by the *Fuero Juzgo*, the peninsula, particularly in what was to be called Andalus, became the seat of agriculture, manufactures, and learning. Abderrahman I and III and Almansor ruled the whole peninsula except the districts between the mountains and the Bay of Biscay in which the ancient inhabitants remained and which came to be the kingdoms of Galicia, Leon, Castile, Navarre, and Aragon about the

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[35] Escriche, Diccionario Razonado, *s. v. Derecho Comun.*

[36] Part. I, tit. II, Law IV.

[37] Legal histories, such as that of Modesto Falcon, omit the Moorish domination as a source of law. Escriche denies its influence, although many of his pages contradict his statement.

Ebro. While the Arabs, like the Goths before them, left the old law to the conquered, they introduced and developed Mohammedan institutions to an extent which left lasting traces.

Mohammedan law is founded upon the Koran, the decisions of the prophet, the traditions of his immediate successors, and ultimately on the agreement of the faithful and analogy in new cases. The state and church were never separated, the executive and the courts were in the same hands even more definitely than with the Gothic councils of Toledo. Different elements appealed to different teachers and there came to be four different schools, of which the more rationalist, founded by Malec, prevailed in North Africa. It was made dominant in Spain by the great teacher Abu Mohammed Yahya and was maintained by Abenhabib, called the wisest of Andalusia, and by Isa of Toledo, named the first of jurisconsults.[38] Law absorbed the study of many families of jurists, as in Seville, Cordova, Valencia, Murcia, Malaga, and Granada; nor was the Malekite doctrine without dissent. The family of Benimajlad founded a school which they maintained for four centuries. Their most distinguished man was Abu Abderrahman Baqui, 817–889, who had 248 teachers and traveled in many lands before settling in Cordova to give a more religious tone to law. He wrote a commentary on the Koran, but should be more famous for his book "El Mosnad," a collection of traditions in the form of a dictionary which cited decisions and 1300 authors.[39] All hail to the author of the first law dictionary, especially as his rivals sought his death until the Emir Mohammed bought a copy of his book and ordered him to keep on teaching!

The classical author of the Malekite school was Sidi Khalil, who flourished in the fourteenth century and whose system still obtains in Algeria and has been frequently published and commented on in modern times. As given by Zeys,[40] it covers, first, Marriage and its dissolution; then Procedure, including something analogous to Injunctions (Interdiction); and third, Contracts, including Partnership. It is perhaps less indebted to the Roman Law than the system of Hanefi, which is predominant in the rest of the present Mohammedan world.

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[38] UREÑA, HOMENAJE A CODERA, 256.

[39] *Ibid.*, 257–58.

[40] TRAITÉ ÉLEMENTAIRE. Published at Algiers in 1885–86.

Under the Moors the highest judicial officer in large towns was the *cadi*, under whom were inferior officials. He sometimes had all kinds of power — civil, military, and religious — and in Toledo, Seville, and Valencia was almost a king.[41] It is a tribute to his justice that the word not only survived in Andalusia but was taken over by the Castilians themselves, although with less dignity. The *Fuero Juzgo* shows so many officials authorized to try cases and so little distinction in the Gothic mind between the makers and expounders of the law that the new word supplied a missing thought. Cervantes mentions *cadi* as the Moorish judge in his day.[42] The word was preserved in the local *fueros*, where *alcadi* was the judge of the *fuero* as distinguished from the judge of the book or *Forum Judicum*. The Spaniards, however, soon lost its judicial meaning and came to use it as *alcalde* for the mayor or chief officer of a community, as we see it to-day.

Under the Moors the officer next to the sultan was the vizier or *alguacer*. As the country became decentralized and smaller chiefs prevailed, the title was in some places, as Toledo, Seville, and Murcia, applied to the executives of the *cadi's* court,[43] and in this sense it passed to the Spaniards. He was sometimes jailer. The word *alguacil* is now an integral part of Spanish jurisprudence and the officer corresponds to the American sheriff and even constable.

Other terms and officers passed from the Moslems to the Spanish, such as *almojárife*, *zalmedina*, *mustaçaf*, *alferez*, *adalid*, *alcabala*,[44] and even *alquilar*, "to rent," and words connected with irrigation. *Exaricos*, "agricultural partners," is from *xarica*, which term was essential to create the relation. It long survived in Aragon,[45] and civilians tried to make it equivalent to *emphyteusis*. Arab words abound in Spanish, and Cervantes claimed that everything beginning with *al* ("the") is Arabic. Few survive in modern Latin-American law except as to irrigation.

The Moorish *cadi* sought first to reconcile the parties before trying the case formally, and this patriarchal function, coming from the deserts of Arabia, was adopted by the Castilians in their prac-

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[41] J. RIBERA TARRAGÓ, ORÍGINES DEL JUSTICIA DE ARAGÓN, 78.
[42] DON QUIXOTE, ch. 40.
[43] J. RIBERA TARRAGÓ, ORÍGINES DEL JUSTICIA DE ARAGÓN, 69.
[44] *Ibid.*, 40, 49, 60, etc.
[45] *Ibid.*, 39.

tice.[46] The first step in procedure in many cases to this day even under the new codes is the proceeding known as Conciliation, an informal adjustment, where possible, of the dispute before it reaches the formal stages of proof.[47] This custom prevails also in Denmark, but has there a different origin.

There is good reason to think that the greatest judicial official of Aragon, the *Justicia*, was taken from the Moslems.[48] They had a similar magistrate, and the Aragonese did not have the office previously. It was this official who offered to the autocratic Philip II the greatest opposition he ever met.

Moorish influence may also be found in substantive law. To this day are applied in Valencia, Murcia, and Granada the irrigation practices of the Moors. Around the Mediterranean, from Egypt to the Pyrenees, there is fertile coast land lacking water, and through this whole region there has come to be an artificial system of irrigation.[49] Egypt, the gift of the Nile, as Herodotus declares, solved the problem first, and the Arabs took to Spain the lessons they had learned there. Around Valencia they led canals to the *huertas* or gardens from the rivers Turia and Jucar; about Murcia others from the river Segura; and about Granada not only canals to the *vegas* or valleys near the Darro and Genil, but from the snows of the mountains to the palace of the *Generaliffe*, all at different periods beginning about 800 A. D. When Jaime I conquered Valencia for Aragon in 1238 he divided the lands and appurtenant waters among his followers according to the Moorish laws and customs, and so he did in 1275 at Murcia. The division of water at Granada is more subject to state control than elsewhere, but at Valencia the users of one canal form a *junta central*, who biennially elect a *junta de gobierno*, syndic, and *atandores*. These supervise irrigation on the Moorish plan not of measurement absolute but of measurement relative, an *hilo* or thread being a twelfth or other subdivision of the available water. The Moorish word for "ditch," *acequia*, still prevails, and indeed this is only one of the many terms which were once quite common and are still found in some places. The officials

[46] J. RIBERA TARRAGÓ, ORÍGINES DEL JUSTICIA DE ARAGÓN, 81.

[47] E. Stocquart, 4 REV. DE DROIT INT. (2e Série), 541 (1902); REV. DE L'UNIV. DE BRUX., 1904, 479.

[48] J. RIBERA TARRAGÓ, ORÍGINES DEL JUSTICIA DE ARAGÓN. The earlier holders of the office are found in REVISTA DE ARCHIVOS, 1904, 119.

[49] JEAN BRUNHES, ÉTUDE DE GEOGRAPHIE HUMAINE, L'IRRIGATION, Paris, 1902.

controlling the turns of irrigation were called *zabacequias*, and about Zaragoza the word for "turn" itself was *adula* or *ador*, which is Arabic, as is also *alfarda*, the "water right."[50] While the words are different, the practice in Egypt was similar. The rules were in neither country reduced to written laws and much was left to the discretion of the public officials. In case of dispute resort is had at Valencia to the *Tribunal de Aguas*, which sits every Thursday on a sofa at the cathedral door, and from its decision upon an informal hearing there is no appeal. The culture of rice, oranges, pears, peaches — all introduced by the Moors — is still governed by their rules.[51] In Porto Rico the landowners on irrigable water form a commission or syndicate, for administrative purposes.[52]

The *Usatges* of the Moors in the eleventh century marked a higher civilization in Spain than in any other part of Europe,[53] and on the surrender of Granada Ferdinand and Isabella contracted that the inhabitants should retain their laws and judges — a promise ill kept. One Moorish custom long prevailed, however, that of a kind of civil marriage in the presence of witnesses. It was called *barragañas* or *sponsalia* and the children were as legitimate as those of a church marriage. The custom was opposed by the clergy and later by the *Cortes*, although it became unlawful only with expulsion of the Moors.[54]

Fueros

Castile, the Spanish land of forts or castles *par excellence* — the borderland — had already absorbed Leon when it took the lead in the long reconquest from the Moors, and so the land conquered became mainly provinces of the kingdom of Castile. Not wholly, however, for Cataluña became part of Aragon and extended that old country to the sea. But the other northern districts which had not yielded to the Moor — Galicia, Viscaya, Navarre — also became independent kingdoms with laws or *fueros* suited to their particular circumstances. Indeed it is true that many cities as they were conquered, beginning with Leon in 1020, were given each

[50] J. Ribera Tarragó, Orígines del Justicia de Aragón, 38.

[51] A correspondent of the New York Evening Post found this court in use and respected by all a few years ago.

[52] Semidey *v.* Central Aguirre Co., 7 P. R. Fed. Rep. 185, 572 (1914).

[53] E. Stocquart, 10 Rev. de l'Univ. Brux., 1905, 480.

[54] *Ibid.*, 478.

its *fuero*, one of the privileges of which was enforcing its law by its own selected judges.[55] These customs gradually crystallized into the *fueros* of Galicia, Viscaya, Navarre, Mallorca, and other districts and contributed not a little to the local independence of the inhabitants of these provinces.

The *Fuero Juzgo* itself was given by Ferdinand III to Cordova as its local *fuero* when in the thirteenth century he recovered it from the Moors — and as he translated it into Castilian for that purpose he incidentally established the beginning of Spanish literature also.

Political institutions became assimilated after Ferdinand of Aragon married Isabella of Castile and their descendants ruled the whole of Spain, but the *fueros* of the old kingdoms and present provinces remain untouched until this day. The *Partidas* and *Recopilacion* did not supersede them. In the eighties of the last century they received much study and a whole library of *Legislacion Foral* was printed and commented on. Such local law of wills, legitimacy, Catalonian *fideicomiso*, the Tribellian quarter, heirship, Aragonese right of survivor of a marriage (whether usufruct or property), and rights of contract[56] not only remained but are expressly recognized by the Civil Code.

These *fueros* go further than the local customs of England, such as gavelkind in Kent, for they are real codes of many civil relations and often differ materially from the Civil Code. A striking instance is in Navarre, whose *fuero* permits a father to dispose of his property by will as he pleases,[57] while the Civil Code of Spain practically denies the right to disinherit children. The preservation of the family as an institution is one of the striking marks of the Civil Law as distinguished from the individualism of the Common Law development. In Aragon King Peter in 1283 granted to the *Cortes* the Great Privilege, which was a kind of Magna Charta, and they also had a remedy, called the Manifestation, which was much like the *habeas corpus* of the English people. While the *Utsages* of that country were not to become as famous as the *Fuero Juzgo* preserved

[55] E. Stocquart, 4 REV. DE DROIT INT. (2e Série), 552 (1902). A list of Aragonese towns which acquired this privilege is given in J. RIBERA TARRAGÓ, ORÍGINES DEL JUSTICIA DE ARAGÓN, 82. The change to political chiefs is more marked in Castile. *Ibid.*, 83.

[56] 1 M. A. MARTINEZ, CODIGO CIVIL, 46.

[57] *Ibid.*, 50.

in the larger kingdom of Castile, they marked a people of originality and vitality.

It would, however, take us too far afield to discuss in detail the *fueros* of these old kingdoms, each of which makes up a substantial volume.[58] They are exceptions which are perhaps not important in the Latin-American countries, for these were settled by Castile. It may well be, however, that the many decrees and *cedulas* issued for the colonies and the later local legislation take the place thus left vacant by the *fueros*. The *Leyes* or *Recopilacion de las Indias* compiled by Charles II in 1680 is still of great value for American countries.[59] The *fueros* are important locally rather than as sources of the Spanish Civil Law as such, for they were found a great obstacle to modern codification and had to be preserved in part.[60] Nevertheless it is well to note that these local grants not only delayed the rise of the feudal system, but developed the law of personal rights even earlier than in England.[61]

Historically the Civil Code adopted in 1889 was in the main but the local law or *fuero* of the greatest province, that is to say, of Castile; for in legal as in political history we have here the process which has made Middlesex into England and the county of Paris into France. Such instances are more than a survival of the fittest — they are the conquest by the fittest.

Consulado

There was another local law of Spain which has had general influence. It arose in Barcelona, the ancient capital of Cataluña, from the beginning until now famous for the independence of its citizens. It was an old saying that they enjoyed so many privileges that nothing was left for the king.

Barcelona was in the Middle Ages one of the great ports of the Mediterranean, as indeed it has remained, and about 1266 there was digested [62] for the Prohoms of the city the maritime customs which

[58] Legislacion Foral, Navarre, 1888; Galicia, 1883; Viscaya, 1888; Cataluña, 1887; Mallorca, 1888; Aragon, 1888. Each has a valuable introduction by a distinguished jurist.

[59] They are, for example, quoted largely in the Instituciones of José Maria Alvarez of Guatemala.

[60] Civil Code, Arts. 10, 16.

[61] E. Stocquart, 10 Rev. de l'Univ. Brux., 470.

[62] Codigo de las Costumbres Maritimas de Barcelona, xxi, Madrid, 1791.

had prevailed on that sea. There had been in Roman times such laws coming from the Rhodians, of which the principal survival is one on Jettison, but doubtless the Rhodian Code has material coming down even from the Phœnicians. From the middle of the thirteenth century the *Consulado del Mar* takes its place alongside the *Siete Partidas*, performing even more thoroughly for the sea what that attempted to do for land.

The chief function of the *Consulado* was to declare the law of commerce by sea and to establish maritime courts under officers called consuls. From time to time other cities of Spain, from Seville to Bilbao, and the ports of other countries following suit obtained the right to such courts.[63] From them originated consuls as now known, and every code of commerce by sea since then has its origin therein.

The law of Spain in its finished form controls the civil relations not only of the peninsula, but of Central and South American countries, of Porto Rico and the Philippines even under the American flag, and of Cuba *libre* also. The Spanish Civil Law is the most influential body of law on the globe to-day, and even to Americans is second only to the Common Law. Its origin is a subject of interest to more people than the origin of any other body of law after the Mosaic. It is no copy of the Code Napoléon, although that was carefully consulted. A French writer of note says that the Spanish code is the more logical. It is, no less than the English Common Law, an outgrowth of the needs of the nation that created it. Unlike the English Common Law, the Civil Law originally aimed to cover all legal relations and left nothing to judicial initiative. This accounts for its exactness and also for its formality. And yet, unlike the Roman Law, room is left in the Spanish code for growth and for expansion somewhat as at Common Law. If a case arises not expressly covered, it must be decided by natural equity,[64] and the

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The Consulado proper contains 292 chapters, distributed under fourteen titles, and the Ordenanzas for judicial procedure, first given Valencia in 1283, were 44 or 35 in number, according to their varying forms.

[63] CODIGO DE LAS COSTUMBRES MARITIMAS DE BARCELONA, 317, 319. The second volume gives the laws of the Rhodians and many other maritime laws.

[64] CIVIL CODE, Art. 6: . . . "When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and, in the absence thereof, the general principles of law."

rule as to negligence is in such general terms as to allow the growth of the whole law of torts. Thus in Porto Rico the American precedents have been imported.[65]

In the Spanish Civil Law, therefore, we find on a Roman foundation Gothic, Moslem, local and maritime elements which, nevertheless, make up a harmonious whole, the outgrowth of Spanish history.[66] This Civil Law is gradually receiving through local legislation the modifications needed to fit it to the wants of half the world; for her widespread colonies continue her civilization after Spain herself has ceased to rule. In this Spanish history is like to that of Rome. And doubtless the Spanish law is the better fitted for its mission that it contains many compromises and admits of more.

The modern nations best representing Rome are Italy, France, and Spain, and their line is gone out throughout all the new world. The triad may be said to represent their original in different ways — Italy in Art, France in Letters, and Spain in Law. Each is influential: but, as law is the underlying force holding society together, we may say of social bonds, as Paul said of a principle in religion, that the greatest of these is Law.

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DISTRICT COURT OF THE UNITED STATES
FOR PORTO RICO.

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[65] CIVIL CODE, Art. 1902: "A person who by act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

[66] The number of codifications necessitated a law of prelation, which dwarfs Valentinian's on citation of the jurisconsults. SOHM, INST. ROMAN LAW, 122; Law II, tit. I, Liber III, of the NOVISIMA RECOPILACION. Other legislation is noted in 1 ESCRICHE, DICCIONARIO, *s. v. Fuero Municipal.*